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Hearing: June 9, 2004

Mailed: September 29, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Excaliber Trading Corporation

v.

Akai Electric Company Limited

Cancellation No. 92026835

Richard W. Young and Nicole M. Murray of Gardner Carton & Douglas LLP for Excaliber Trading Corporation.

Peter J. Toren of Sidley Austin Brown & Wood LLP for Akai Electric Company Limited.

Before Seeherman, Hohein and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

On September 30, 1997, Excaliber Trading Corporation (petitioner) filed a petition to cancel the registration owned by Akai Electric Company Limited (respondent or Akai) for the mark AKAI for the following goods:¹

video tape recorders; television cameras; television receivers; parts and accessories therefor-namely, R.F. converters, earphones, connecting cords, batteries,

¹ Registration No. 930495; issued March 7, 1972 under Section 2(f) of the Trademark Act; second renewal.

headphones, leather cases and tripods; and loudspeakers, audio frequency amplifiers, and FM receivers.

As the ground for cancellation, petitioner alleges that respondent has "made no use of the mark AKAI since at least March 1992, the date of the last renewal of the registration." ¶ 3. Petitioner also alleges that it has a bona fide intention to use such mark in connection with home and automobile audio systems in commerce; that it has filed an application to register the AKAI mark for home and automobile audio systems including amplifiers, receivers, loudspeakers, tape decks and CD players; and that the continued existence of the involved registration is likely to cause damage to petitioner by interfering with petitioner's right to use and register its mark.

Respondent, in its answer, admits that petitioner has filed an application to register the mark AKAI for the identified goods, but denies the remaining salient allegations of the petition to cancel.

Both parties introduced evidence in this case during their respective testimony periods and both parties filed trial briefs. An oral hearing was held.

THE RECORD

The undisputed portions of the record include the pleadings; the file of the involved registration; respondent's notice of

reliance on official records consisting of additional registrations of "AKAI" marks owned by respondent (Exhibits 1 and 2); printed publications consisting of media articles referring to AKAI products (Exhibits 4 - 15); and the testimony depositions of respondent's non-party witnesses: Norbert R. Wirsching, a consultant to international firms in the electronics field; and Ed Brachocki, president and CEO of Go-Video, a consumer electronics company.

The disputed portions of the record are as follows.

(a) Petitioner's entire notice of reliance on Exhibits A - C:

(1) Exhibit A - Printed publications.

(2) Exhibit B - Documents "provided as part of Respondent's answers to interrogatories," consisting of: a document entitled "Business History and Forecast" ("Business History"); and a single invoice of sale (inv. no. 240901) from P. T. Imports Inc. (PTI).

(3) Exhibit C - Documents obtained in response to petitioner's requests for production of documents, consisting of: an internal marketing document from 1998 entitled "Akai World-wide Activity"; a July 31, 1997 fax from Takashi Sugiyama, marketing director of the Hong Kong branch of Akai, to Toru Endo, respondent's general manager for sales, referring to Akai's alleged "withdrawal from the market"; and a January 31, 1998 fax

from Mr. Endo to Phillip Watson, an attorney for Akai, regarding respondent's sales in the United States.

(b) Respondent's notice of reliance on Exhibits 3 and 16-19:

(1) Exhibit 3 - The file history of a prior opposition between Akai (opposer therein) against a third party. Petitioner objects to this material only to the extent that respondent seeks to rely on the record in that case.

(2) Exhibits 16 through 18 - Three declarations, with exhibits, submitted in connection with respondent's previous motion for summary judgment in this case. The declarations are from Takashi Sugiyama, David Friedmann (executive officer of PTI) and Toru Endo. The "Business History" and PTI invoice no. 240901 (which were also submitted under Exhibit B of petitioner's notice of reliance) are attached as exhibits to the Endo and Sugiyama declarations, respectively.

(3) Exhibit 19 - Copies of documents "which were produced by [respondent] in this matter" apparently in response to petitioner's discovery requests, consisting of: duplicates of documents accompanying the three declarations and a February 18, 1997 letter from Robert S. Rad, petitioner's president, to Mr. Sugiyama regarding the possible licensing of the AKAI mark.²

² However, it is not clear whether Mr. Rad was president of petitioner at the time the letter was written or whether the letter was written on behalf of petitioner.

As to the above, petitioner's objections to respondent's notice of reliance on Exhibits 3 and 16 - 19 are manifestly untimely and are accordingly denied. To begin with, we note that petitioner never raised any objections to respondent's exhibits either in its main brief or its reply brief. Petitioner now seeks to remedy its perceived oversight by filing a motion to withdraw its original reply brief and to substitute a "corrected" reply brief that includes such objections, along with corrections of certain factual errors in the original reply brief.

Respondent filed a response to the motion, strenuously objecting to the substitute brief and incorporating in its response a motion for Rule 11 sanctions against petitioner for filing it.

Respondent's objections to the motion are well taken. By its motion, petitioner seeks to correct far more than mere factual errors in its original reply brief. Raising objections to evidence for the first time in a "corrected" reply brief is beyond what is appropriate for a substitute brief.³ Petitioner's motion is accordingly denied, and the "corrected" reply brief

³ Moreover, contrary to petitioner's apparent contention, such objections, if permitted, without question would affect the merits of the case.

will not be further considered (except to the limited extent indicated).⁴

The mere fact that petitioner did not object to respondent's evidence in its main brief would not have resulted in a waiver of such objections since respondent, for its part, did not properly introduce the evidence into the record.⁵ The Board will not consider evidence that is not filed in compliance with the rules. See TBMP §706 (2nd ed. rev. 2004). However, petitioner treated the evidence as of record, in its main brief, by expressly acknowledging such materials in its description of the record and even addressing some of the evidence on the merits. As a result, all of the evidence is considered to have been stipulated into the record.⁶ Petitioner's attempt to essentially withdraw this

⁴ To the extent we find that there are any appropriate corrections of misstatements of the record, those corrections will be considered. To the extent that petitioner's contentions in its original reply brief are inconsistent with statements made in its main brief, or are inconsistent with, or directly contradicted by, the evidence of record on its face, those contentions in the original reply brief will not be given any consideration.

⁵ Except for the opposition file (Exhibit 3) and certain documents which are considered to be properly of record because both parties relied on them (see discussion regarding respondent's objections to petitioner's notice of reliance, *infra*), none of the disputed evidence submitted with respondent's notice of reliance was properly made of record.

⁶ The opposition file (Exhibit 3) was acknowledged as of record only for what it shows on its face. The record in that case is not evidence in this proceeding on behalf of either party. See TBMP §704.04 (2nd ed. rev. 2004).

stipulation in its corrected reply brief is ineffective as the corrected brief is not being considered.

Accordingly, respondent's Exhibits 16 - 19, consisting of the three declarations, with exhibits including the "Business History" document, are treated as if properly of record, as are all the documents contained in respondent's Exhibit 19, and will be considered for whatever probative value they may have. Respondent's Exhibit 3, consisting of the opposition file, is considered of record only for what it shows on its face.

With respect to respondent's motion for Rule 11 sanctions, because respondent did not comply with the "safe harbor" and "separate motion" requirements of the rule, the motion must be and is hereby denied. See Fed. R. Civ. P. 11(c)(1)(A).

We turn then to respondent's objections to exhibits submitted under petitioner's notice of reliance. The documents comprising Exhibit B of the notice of reliance, i.e., the Business History record and the PTI invoice no. 240901, have already been allowed into evidence in connection with the declaration of Mr. Sugiyama and as part of respondent's Exhibit 19. As these materials are properly of record, they can be relied on by either party for any proper purpose. *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633 (TTAB 1999).

As to petitioner's Exhibit C, with certain exceptions not applicable here, documents obtained in response to document

production requests may not be introduced into evidence by notice of reliance. See TBMP §704.11 (2nd ed. rev. 2004). Consequently, neither the 1998 "Akai World-wide Activity" report nor the January 31, 1998 fax from Mr. Endo are considered to be of record.

Respondent's objection to Exhibit A (printed publications) will be addressed separately below.

STANDING

Respondent admitted in its answer that petitioner has filed an application to register the identical mark for goods which are, on their face, in part identical to those in the challenged registration. Thus, petitioner's standing, that is, its real interest in this proceeding, has been established. See *Ralston Purina Co. v. On-Cor Frozen Foods, Inc.*, 746 F.2d 801, 223 USPQ 979 (Fed. Cir. 1984).

MERITS

Respondent, Akai Electric Company Ltd., is a company incorporated in Japan with its principal place of business in Japan. Mr. Sugiyama states that Akai has been distributing and selling consumer electronics products in the United States under the AKAI mark since at least 1970, and that it currently sells a wide array of consumer electronics products under the mark in more than ninety countries throughout the world including the United States. According to Mr. Sugiyama, Akai has expended tens

of millions of dollars worldwide in connection with the advertising and promotion of its AKAI goods over the years with worldwide sales amounting to billions of dollars. Since at least 1970 and continuing until 1987, respondent distributed and sold its AKAI consumer electronic products in the United States through its subsidiary, Akai America Ltd. During that same time period, respondent also began distributing its AKAI products in the United States through P. T. Imports Inc. (PTI), a company incorporated and doing business in New York, and continued to do so until at least 1999. After Akai America Ltd. shut down in 1988, Mitsubishi Electric Sales America served as the distributor in the United States until 1990. In September of 1995, respondent began selling its AKAI products in the United States through Sansui U.S.A. Between 1995 and 1999 respondent conducted negotiations for new distributors of its AKAI products in the United States with several companies, including Emerson, Go-Video, Projectvision and Sears Roebuck & Co.

Petitioner contends that respondent made a "widely publicized announcement" of its permanent withdrawal from the United States consumer electronics market in 1988. Brief, p. 4. Petitioner bases this claim on information contained in three magazine articles and a statement by Mr. Sugiyama allegedly referring to Akai's "withdrawal from the market." Petitioner contends that Akai's total withdrawal from the United States

market is shown by respondent's "Business History" record reflecting "'zero' sales in the United States from 1991 through 1994"; (Brief, p. 2) and a single PTI invoice of sale marked with the wording "FOR RE-EXPORT OUTSIDE U.S.A." for 1,990 units of AKAI products totaling \$287,000. Petitioner maintains that respondent's efforts in "the late 1990s" (Brief, p. 4) to resurrect its presence in the United States are unavailing since they occurred after respondent had already abandoned the mark.

Under Section 45(a) of the Trademark Act, a mark is deemed to be abandoned when its use has been discontinued with intent not to resume such use. The petitioner bears the burden of proving abandonment and must do so by a preponderance of the evidence. *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989). The petitioner may prove its case either by establishing that respondent has discontinued use of the mark and that it has no intent to resume use, or by establishing the statutory prima facie case of abandonment. A prima facie case of abandonment may be established by petitioner by proof of respondent's nonuse of the mark in the United States for three consecutive years. See Section 45 of the Trademark Act and *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990).

Proof of a prima facie case "eliminates the challenger's burden to establish the intent element of abandonment as an initial part of [its] case," and creates a rebuttable presumption that the registrant abandoned the mark without intent to resume use. See *Imperial Tobacco v. Philip Morris Inc.*, supra at 1393. This presumption shifts the burden to the respondent to come forward with evidence to rebut the prima facie case by disproving either the underlying facts triggering the presumption of three years nonuse, or the presumed fact itself, i.e., no intent to resume use. See *Imperial Tobacco v. Philip Morris Inc.*, supra.

We turn first to a consideration of the magazine articles. One article appeared in *Dempa Digest* on December 12, 1988. Under the heading "Viewpoint: Akai to Disappear from American Market," the article states, in part:

For Akai America it was a case of too little too late. The company...will withdraw from the U.S. market by the end of this year. ... Akai will continue to exist and thrive elsewhere, but the brandname that was the favorite of American audiophiles will cease to exist.
...

Another article appeared on the same date in *Consumer Electronics*. The caption of the article is, "Akai's 2nd pullout from U.S. raises questions in industry" and the text of the article states (emphasis added):

...Akai's second pullout from the United States in as many years led to speculation last week about the growth potential for upscale electronics and

conflicting views about Mitsubishi's reasons for taking on the brand in the first place.

Mitsubishi officials who ran Akai, meanwhile, cited an inability to procure enough products at the right prices as the chief reason for the move. They also cited the strong yen and a decision to concentrate on the Japanese and European markets, where Akai holds a stronger position. The company will cease distribution December 31. ...

Jeff Saake, Akai's national marketing manager, asserted that the main reason for the pullout was that "Akai Electric of Tokyo cannot supply us with enough product to allow us to grow at sufficient levels." He said the decision was "a painful, mutual decision between Akai and Mitsubishi."

A second article appearing in *Consumer Electronics* on July 19, 1993 under the headline, "SANYO IN RED FOR HALF" states, in part:

...

Akai, which pulled out of the U.S. consumer electronics market in 1988 (TVD Dec 5/88 p11), had pre-tax loss of \$8.8 million for 6 months ended May 20, ...

Petitioner, however, is seeking to introduce this evidence for the truth of the matter asserted, i.e., that Akai withdrew from the U.S. market in 1988. Respondent has objected to these articles as hearsay and the objection is well taken. Petitioner essentially argues that these articles fall within the exception of either Fed. R. Evid. 803(17) or 807, and that the statement by Jeff Saake is not hearsay as an admission by a party under Rule 801(d) (2) .

Petitioner, as the proponent of the evidence, has the burden of establishing a proper foundation for its admission under an exception to the hearsay rule. See *Los Angeles News Service v. CBS Broadcasting Inc.*, 305 F.3d 924, 64 USPQ2d 1491 (9th Cir. 2002). Petitioner has not met this burden. The articles, containing statements made by unidentified authors who are reporting information obtained from unidentified sources,⁷ are rank hearsay and are neither included nor excepted under any hearsay rule. They are inherently unreliable and fail to satisfy any of the indicia of trustworthiness required for admissibility. The repetition of the same hearsay information in multiple articles does not make it more reliable.

Because the evidence has not been shown to be reliable and the guarantees of trustworthiness have not been satisfied, the evidence fails to satisfy even the preliminary requirement of the residual hearsay exception of Fed. R. Evid. 807. Nor does the evidence meet the other requirements of Rule 807 since, at a minimum, petitioner has failed to even identify the author of the articles as required by that rule.

Moreover, petitioner has failed to show that the articles are admissible under Fed. R. Evid. 803(17). As provided therein, the following are not excluded by the hearsay rule:

⁷ The identification of "Mitsubishi officials" as the source of the information is hardly sufficient and moreover is itself hearsay.

Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Here, petitioner has not established that the articles are "compilations" as contemplated by such rule. Nor in our opinion do they appear to be. The type of publications contemplated by the rule are those which deal with compilations of objective facts not requiring for their statement a subjective analysis of other facts. See *White Industries, Inc. v. Cessna Aircraft Co.*, 611 F.Supp. 1049, 1069 (W.D. Mo. 1985). Further, petitioner's mere assertions in its reply brief that these publications are generally used and relied upon by people in the consumer electronics business are unsupported by any testimony or other evidence and are insufficient to satisfy this basic requirement of the rule.⁸

Petitioner's contention that the article is admissible as the admission of a party under Fed. R. Evid. 801(d)(2) is also unavailing. That rule provides that a statement is not hearsay if, under subsection (C), it is a statement "by a person authorized by the party" to make it, or if, under subsection (D), it is a statement "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during

⁸ In a belated attempt to provide a foundation for these articles, petitioner in its reply brief makes unsupported assertions regarding the nature of the magazines and the source of the information (i.e., another magazine).

the existence of the relationship." While there is no question that the statement is being offered against a party, petitioner has failed to show as required that the statements were either authorized by respondent,⁹ as required by Rule 801(d)(2)(C), or that Jeff Saake was in fact an agent of respondent when he made the statements or that his statements concerned a matter "within the scope" of his agency, as required by Rule 801(d)(2)(D). Rule 801(d)(2) plainly states that the contents of the hearsay statements "are not alone sufficient to establish the declarant's authority under subdivision (C), [or] the agency or employment relationship and scope thereof under subdivision (D)."

Finally, the statements cannot be considered an admission by silence under Fed. R. Evid. 801(d)(2)(B). There is no evidence that the purported withdrawal was widely publicized, as petitioner claims, or in any event that these magazines are reputable or reliable or widely read or circulated in the industry, or that respondent was even aware that the statements were made. Even if Akai knew about the articles, we would not presume to know whether it would have been a good business decision for Akai to challenge what may have been erroneous

⁹ Petitioner itself characterizes the so-called "high-level representatives" mentioned in one of the articles as only having "apparent" authority to speak for respondent. Reply Brief, p. 4.

statements made by the media or the media's inaccurate reporting or interpretation of statements made by others.

All of this information is hearsay and of no probative value. Moreover, for reasons that will become apparent, other evidence submitted by petitioner fails to corroborate the statements made in such articles.¹⁰

We turn then to a consideration of petitioner's other evidence of the claimed abandonment. Such evidence consists of the single PTI invoice of sale, Mr. Sugiyama's faxed letter to Mr. Brachocki and respondent's Business History record.

Respondent's Business History record covering the years 1991 to 1995 shows on its face that there were no sales of *video* equipment in the United States from 1991 to 1995. Since respondent's registration covers both audio and video equipment, if anything, this is *prima facie* evidence of an abandonment of the mark AKAI only as to the video equipment identified in the registration. However, a similar Business History document relating specifically to audio sales, introduced in connection with the declaration of Mr. Sugiyama, indicates that there were no audio sales in the United States for that time period either.

¹⁰ Not only is this evidence uncorroborated hearsay, but it is either inconsistent with or contradicted and/or explained by other evidence in the record.

The statement made by Mr. Sugiyama in a fax of a letter dated July 31, 1997 was in response to Go-Video's request for historical information about respondent's U.S. sales and customer records. Mr. Sugiyama responded,

...we will try our best to collect and gather them, however please do not expect much about it due to an absense [sic] of the staff engaged in the marketing at that time through a several [sic] re-organization of the company during a long time after our withdrawal from the market.

....

On its face, and when read in its entirety, the letter is ambiguous at best and the context of Mr. Sugiyama's reference to a "withdrawal from the market" is unclear. There is no designated time period for which the information was requested and no indication as to when the purported withdrawal occurred. According to Mr. Sugiyama's declaration, AKAI branded products have been sold in the United States since 1970. Any alleged withdrawal, to the extent there was one, could have occurred prior to the time period at issue in this proceeding. In addition, considering the somewhat unusual phrasing and syntax of the letter, it is not clear what the wording "withdrawal" or "our withdrawal" even refers to.¹¹ Thus, any connection between the reference to a "withdrawal" from the market and the absence of

¹¹ We note Mr. Brachocki's statement in his deposition that Mr. Sugiyama "was actually very difficult to understand." Dep., p. 34. Moreover, Mr. Endo explained that Mr. Sugiyama was only referring to the closing of respondent's subsidiary, Akai America Ltd., not a withdrawal of Akai's products from the U.S. market.

sales figures in the Business History record is too tenuous to permit an inference of abandonment during the relevant time period based on this evidence.

Petitioner also introduced a single invoice of sale marked "for re-export outside U.S.A." and showing a shipment of 1,990 units of AKAI products to the United States. Petitioner argues, based thereon, that whatever sales occurred were inconsequential and "totaled less than nine one-hundredths of one percent" of respondent's worldwide video sales during the period from 1988 to 1995. Brief, pp. 2, 5. Petitioner maintains that the shipments do not constitute "bona fide use in the ordinary course of trade"; that the products were incompatible with American televisions; and that the products were destined for re-export from the United States.

Thus, only the Business History record, together with the invoice of sale, establish a prima facie case which, if unrebutted, would be sufficient to show abandonment of the AKAI mark from 1991 to 1995 with no intent to resume use. Respondent, however, has come forward with evidence disproving the underlying facts triggering the presumption of three years nonuse.

Specifically, Mr. Endo has explained the absence of any sales recorded under the "USA" category of the document. He points out that the "USA" category would only reflect sales in the United States to companies other than PTI, and that all sales

to the United States were recorded under the category for PTI. The record shows that there were no other U.S. distributors for AKAI products during that time period or at least until September 1995 when Sansui became a distributor.

Respondent has also made of record additional PTI sales invoices for AKAI products; one from 1988, two from 1989, and at least one for each of the years 1990, 1992, 1993 and 1995. Further, in response to Go-Video's request for historical information, Mr. Endo indicated in its February 13, 1998 fax to Mr. Watson that when respondent moved its office from Tokyo to Yokohama on July 31, 1997 and its marketing headquarters from Japan to Hong Kong it became difficult to "find out old data" and that "such old invoices" might have been disposed of during the move. This explanation is consistent with Mr. Sugiyama's 1997 statement regarding the "withdrawal from the market" and the ensuing difficulty of obtaining historical records due to the "absense of the staff" and "re organizations of the company." It was likewise Mr. Brachocki's understanding that the records were no longer available "because the people who had been there doing that were no longer with the company."

Accordingly, not only do we have evidence that the invoices may have been destroyed or were otherwise unobtainable, but in addition Mr. Sugiyama states, and respondent's business record entitled "Conversion [sic] Table from Yen to US\$ Basis" shows,

that sales of AKAI audio and video equipment to PTI from November 1990 through November 1994 generated millions of dollars in each of those years, including 1992 and 1994, the years for which no invoices were produced.

Petitioner's other arguments concerning these invoices and what they show or do not show are entirely unpersuasive.

Petitioner claims that sales under the mark were inconsequential and not in the ordinary course of trade. Evidence of sales amounting to millions of dollars a year, on its face, does not appear to be inconsequential. In fact, Mr. Endo describes these sales to PTI (as reflected in the Business History record) as accounting for "a large portion" of Akai's worldwide sales from 1991 to 1995. Decl. ¶ 8. As the party bearing the burden of proof, it was incumbent on petitioner to establish that the sales were only casual or inconsequential. Petitioner has not done this.

Petitioner's claim that the products were destined for re-export from the United States is similarly unpersuasive. Petitioner bases this contention on the fact that two sales invoices were marked "for re-export outside U.S.A." In fact, none of the other five invoices produced by respondent contains that statement.¹² Moreover, Mr. Sugiyama has stated that since at

¹² Petitioner also based this claim, in part, on a fax from Mr. Endo which, as indicated earlier, has not been properly introduced into the

least 1981, respondent has continuously distributed and sold AKAI products in the United States and Mr. Friedmann stated that the AKAI products imported by PTI have been distributed for sale at consumer electronics stores in the United States in each year for at least the past fifteen years.

Furthermore, it would not make a difference even if the products were only resold abroad. Under Section 45 of the Trademark Act, "use" of a mark means use "in commerce." That section further provides that a mark shall be deemed to be "in use in commerce" on goods when "the goods are sold or transported in commerce." The word "commerce" means "all commerce which may lawfully be regulated by Congress." Commerce between the United States and a foreign country is a type of commerce that is regulable by Congress. See *Person's Co. Ltd. v. Christman*, supra at 1479. See also *Shelby v. Ford Motor Co.*, 43 USPQ2d 1692, 1694 (C.D. Calif. 1997) ("Section 45 makes clear that 'use...in the ordinary course of trade' is synonymous with 'use in commerce,' defined as 'all commerce which may be lawfully regulated by Congress'.")

record. However, even if we did consider it, we would find that it supports respondent's contention that AKAI products were in fact sold in the United States to embassies, tourists shops, military PX stores, and government offices and schools. Contrary to petitioner's apparent contention, it is irrelevant whether or not the sales were made in "duty-free zones."

Clearly then, the importation of AKAI products into the United States from a foreign country constitutes use in commerce, and under the circumstances, a bona fide use of the mark in commerce. See *7-11 Sales, Inc. v. Perma, S.A.*, 225 USPQ 170 (TTAB 1984) (petitioner made no showing that the marks were not used in commerce between the United States and a foreign country and thus did not meet its burden). See also *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, supra at 1310 ("In cases involving products made abroad, proof of nonuse of the trademark may require both proof of no importations into the United States and no domestic sales," citing *7-11 Sales, Inc. v. Perma, S.A.*, supra); and, e.g., *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301 (TTAB 2004).

Thus, the question of whether or not the AKAI products were compatible with U.S. electronic equipment is irrelevant. In any event, petitioner's claim that they were incompatible is directly contradicted by respondent's evidence. Mr. Endo, in his declaration, identified specific models of VCRs that are compatible with U.S. televisions. Some of the invoices show these model numbers. According to Mr. Wirsching, the advantage of Akai's products is that many of them are "multistandard" in that they are compatible with either the system used in the United States (NTSC) or the system used in Europe and most other parts of the world (PAL). Dep., pp. 31,32. In addition, Mr.

Endo, in his faxed letter to Mr. Watson, refers to the fact that the purchase amount of PTI for this period was large "due their purchase for multi system VCR." In any event, once again, the burden was not on respondent to prove that it used the mark on compatible electronic equipment.

Finally, it is clear from the testimony and other evidence of record, including acknowledgment by those knowledgeable about the consumer products industry, that the mark AKAI has at all times, including the period of alleged abandonment, continued to retain valuable goodwill in the United States and a strong reputation in the industry. See, e.g., *Ferrari S.p.A. Esercizio Fabbriche Automobili e Corse v. McBurnie*, 11 USPQ2d 1843 (S.D. Cal. 1989).

Weighing all the evidence of record, we find that respondent has sufficiently rebutted petitioner's prima facie showing of abandonment for any consecutive three-year period. Moreover, petitioner has failed to carry its burden of producing evidence sufficient to demonstrate nonuse of AKAI for any period of time with no intent to resume use.

Decision: The petition to cancel is dismissed.